

which requires the Court to view the record in the light most favorable to the party opposing the motion for summary judgment and to resolve all doubts in his favor.

Id. Each party's motion will be reviewed accordingly.

There is no dispute that 401 KAR 5:072 was reviewed by the Administrative Regulation Review Subcommittee and the Interim Joint Committee on Agricultural and Natural Resources. There is also no dispute that 401 KAR 5:072 expired with the adjournment of the General Assembly on March 23, 2001. The issue before the Court is whether this regulation is substantially similar to the current regulation, 401 KAR 5:074E. If so, KRS 13A.333 renders it void. This statute provides in pertinent part:

(1) If an administrative regulation is found deficient by a legislative subcommittee under the provisions of KRS Chapter 13A during a regular session of the General Assembly, it shall expire on adjournment of that regular session of the General Assembly.

(6) (a) An administrative body shall be prohibited from promulgating an administrative regulation that is identical to or substantially the same as an administrative regulation which has expired pursuant to subsections (1), (2), and (4) of this section. This prohibition shall be effective for a two (2) year period running from the date of expiration of the administrative regulation.

(b) An administrative regulation shall be determined to be identical to or substantially the same as an administrative regulation that expired if it is deficient in the same manner as the administrative regulation that expired because it was found to be deficient.

Having reviewed both 401 KAR 5:072 and 401 KAR 5:074E, the Court

finds the two regulations are substantially the same. The changes to sections 2 and 3 are not material, and sections 3 and 4 are identical. The defendants argue that KRS 13A.333 (6)(c) provides an exception to this prohibition. This section provides:

An administrative regulation shall not be determined to be identical to or substantially the same as an administrative regulation that expired if:

1. It contains the identical or substantially similar language or provisions that gave rise to the finding of deficiency of the expired administrative regulation; and
2. The identical or substantially similar language or provisions that gave rise to the finding of deficiency of the expired regulation are required by state law, or federal law or regulation, or court decision.

The Cabinet argues that because 401 KAR 5:074E establishes criteria for determining whether integrators have substantial control of CAFOs, the two regulations are substantially different. The Court disagrees. 401 KAR 5:072 provides:

Owner and Operator Liability.

(1) All persons who own or operate a concentrated animal feeding operation shall sign an application for and obtain a KPDES permit. This includes a person who enters into a contract with an owner or operator of a concentrated animal feeding operation if the person: (a) owns the animals; (b) directs the manner in which the animals will be housed or fed; or (c) controls the inputs or other material aspects of the concentrated animal feeding operation.

(2) All owners and operators of concentrated animal feeding operations shall be jointly and severally liable for complying with the KPDES permit.

401 KAR 5:074E provides:

Operators of concentrated animal feeding operations.

(1) A person who exercises substantial operational control over a concentrated animal feeding operation shall be considered an operator of the concentrated animal feeding operation. A person exercises substantial operational control if the person:

(a) Directs the activities of persons working at the concentrated animal feeding operation either through contract, or direct supervision of, or on-site participation in, activities at the concentrated animal feeding operation;

(b) Owns all, or a significant percentage of, the animals; or

(c) Specifies how the animals are grown, fed, or medicated.

While 401 KAR 5:074E does adopt a “substantial control” definition of operator, the requirements are similar to those set forth in 401 KAR 5:072.

Further, the new regulation retains the single factor bright line test. Based upon these similarities, and the fact that sections 3 and 4 are virtually identical¹, the Court finds the two regulations are substantially similar. As the exceptions set forth in KRS 13A.333(6)(c) do not apply, 401 KAR 5:074E is void.

Having decided this case on the basis of KRS 13A.333, the Court will not rule on the questions of whether 401 KAR 5:074E is more stringent than the applicable federal law, whether sections 2 and 3 of 401 KAR 5:074E exceeds the Cabinet’s authority under state law, and whether the setback requirements violate Section 2 of the Kentucky Constitution. Nor will the Court address the constitutionality of Chapter 13A of the Kentucky Revised Statutes absent a direct

¹401 KAR 5:074E (3) is entitled “Best Management Practices”, while 401 KAR 5:072 is entitled “Siting Criteria”. Otherwise the provisions are identical.